

1 DAVID A. ASTENGO
2 NEVADA BAR NO. 11045
3 SELMAN BREITMAN LLP
33 New Montgomery, Sixth Floor
4 San Francisco, CA 94105-4537
Telephone: 415.979.0400
5 Facsimile: 415.979.2099
Email: dastengo@selmanlaw.com

6 Attorneys for EVEREST NATIONAL INSURANCE
COMPANY

7 Eric S. Powers
8 Nevada Bar No. 12850
9 SELMAN BRIETMAN LLP
3993 Howard Hughes Parkway, Suite 200
10 Las Vegas, NV 89169
Telephone: 702.228.7771
Facsimile: 702.228.8824
11 Email: epowers@selmanlaw.com
12 Designated For Nevada Service Only
(Per L.R. IA 11-1(b)(1))

13 UNITED STATES DISTRICT COURT
14 DISTRICT OF NEVADA

15 CENTEX HOMES, a Nevada general
16 partnership,

17 Plaintiff,

18 v.

19 ST. PAUL FIRE AND MARINE INSURANCE
20 COMPANY, a Connecticut corporation;
EVEREST NATIONAL INSURANCE
21 COMPANY, a Delaware corporation;
INTERSTATE FIRE & CASUALTY
22 COMPANY; an Illinois corporation;
LEXINGTON INSURANCE COMPANY, a
23 Delaware corporation; and FEDERAL
INSURANCE COMPANY, an Indiana
24 corporation,

25 Defendants.

26 EVEREST NATIONAL INSURANCE
27 COMPANY, a Delaware corporation,

28 Counterclaimant,

v.

Case No. 2:17-cv-02407-JAD-VCF

STIPULATION FOR EVEREST NATIONAL
INSURANCE COMPANY FILING A FIRST
AMENDED COUNTERCLAIM

CENTEX HOMES, a Nevada general
partnership,

Counterdefendant.

EVEREST NATIONAL INSURANCE
COMPANY, a Delaware corporation,

Cross-Claimant,

v.

INTERSTATE FIRE & CASUALTY
COMPANY, an Illinois corporation,

Cross-Defendant.

Defendant/Counterclaimant/Crossclaimant EVEREST NATIONAL INSURANCE
COMPANY (hereinafter, "EVEREST") and Plaintiff/Counterdefendant CENTEX HOMES, and
pursuant to Rule 15(a)(1) of the Federal Rules of Civil Procedure, hereby stipulate and agree that
EVEREST may file a First Amended Counterclaim, a copy of which is attached as Exhibit "A"
hereto.

PAYNE & FEARS, LLP

DATED: February 23, 2018

By:

/s/ SARAH J. ODIA

SARAH J. ODIA

Nevada Bar No. 11053

sjo@paynefears.com

PAYNE & FEARS LLP

6385 S. Rainbow Blvd., Suite 220

Las Vegas, NV 89118

ATTORNEYS FOR

CENTEX HOMES

///

///

///

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SELMAN BREITMAN, LLP

DATED: February 23, 2018

By:

/s/DAVID A. ASTENGO

DAVID A. ASTENGO

Nevada Bar No. 11045

dastengo@selmanlaw.com

SELMAN BREITMAN, LLP

33 New Montgomery, Sixth Floor

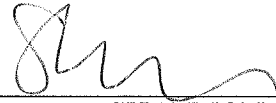
San Francisco, CA 94105

ATTORNEYS FOR

EVEREST NATIONAL INSURANCE
COMPANY

CERTIFICATE OF SERVICE

In accordance with Rule 5(b) of the Federal Rules of Civil Procedure, I hereby certify that I am an employee of SELMAN BREITMAN LLP and that on February 23, 2018, a copy of STIPULATION FOR EVEREST NATIONAL INSURANCE COMPANY FILING A FIRST AMENDED COUNTERCLAIM was served on all CM/ECF registered parties by filing and serving the same using the CM/ECF filing system.



SHANNON GAFFEY
An Employee of Selman Breitman LLP

EXHIBIT A

1 DAVID A. ASTENGO
2 NEVADA BAR NO. 11045
3 SELMAN BREITMAN LLP
33 New Montgomery, Sixth Floor
4 San Francisco, CA 94105-4537
Telephone: 415.979.0400
5 Facsimile: 415.979.2099
6 Email: dastengo@selmanlaw.com

7 Attorneys for Defendant/
8 Counterclaimant/Cross-Claimant
9 EVEREST NATIONAL INSURANCE
10 COMPANY

11 Eric S. Powers
12 Nevada Bar No. 12850
13 Selman Breitman LLP
14 3993 Howard Hughes Parkway, Suite 200
15 Las Vegas, Nevada 89169
16 Telephone: 702.228.7771
17 Facsimile: 702.228.8824
18 Email: epowers@selmanlaw.com
19 Designated For Nevada Service Only
20 (Per L.R. IA 11-1(b)(1))

21 UNITED STATES DISTRICT COURT
22 DISTRICT OF NEVADA

23 CENTEX HOMES, a Nevada general
24 partnership,

25 Plaintiff,

26 v.

27 ST. PAUL FIRE AND MARINE INSURANCE
28 COMPANY, a Connecticut corporation;
EVEREST NATIONAL INSURANCE
COMPANY, a Delaware corporation;
INTERSTATE FIRE & CASUALTY
COMPANY, an Illinois corporation;
LEXINGTON INSURANCE COMPANY, a
Delaware corporation; and FEDERAL
INSURANCE COMPANY, an Indiana
corporation,

Defendants.

Case No.: 2:17-cv-02407-JAD-VCF

EVEREST NATIONAL INSURANCE
COMPANY'S ANSWER TO CENTEX
HOMES' FIRST AMENDED COMPLAINT
AND FIRST AMENDED COUNTERCLAIM
AGAINST CENTEX HOMES

Defendant, Counterclaimant and Cross-Claimant EVEREST NATIONAL INSURANCE COMPANY (hereinafter "Everest") by and through its counsel, answers the First Amended Complaint of plaintiff CENTEX HOMES (hereinafter "Plaintiff") as follows:

RESPONSE TO PARTIES

1. Answering paragraph 1, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and therefore, denies each and every allegation.

2. Answering paragraph 2, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

3. Answering paragraph 3, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

4. Answering paragraph 4, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

5. Answering paragraph 5, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

6. Answering paragraph 6, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation same.

7. Answering paragraph 7, Everest admits that it is that is a corporation organized and existing under the laws the State of Delaware, with its principal place of business in New Jersey. Everest further admits that it is an insurance company eligible to do business in Nevada. Everest further admits that eligible to do business as an insurer in the State of Nevada.

8. Answering paragraph 8, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and,

1 therefore, denies each and every allegation.

2 9. Answering paragraph 9, Everest is without sufficient knowledge or information
3 necessary to form a belief as to the truth or falsity of the allegations contained therein and
4 therefore, denies each and every allegation.

5 10. Answering paragraph 10, Everest is without sufficient knowledge or information
6 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
7 therefore, denies each and every allegation.

8 **RESPONSE TO JURISDICTION AND VENUE**

9 11. Answering paragraph 11, Everest is without sufficient knowledge or information
10 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
11 therefore, denies each and every.

12 12. Answering paragraph 12, Everest is without sufficient knowledge or information
13 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
14 therefore, denies each and every allegation.

15 **RESPONSE TO GENERAL ALLEGATIONS**

16 13. Answering paragraph 13, Everest admits that in the action captioned, *Kachnik, et*
17 *al. v. Centex Homes*, District Court, Clark County, Nevada, Case No. A1-15-726385-D (the
18 "Kachnik action"), it is alleged that Centex Homes "participated in" the design, development,
19 construction, marketing and/or sale of the homes which are the subject of the action and which are
20 located in a development known as Rose Lake, in Clark County, Nevada. With regard to all other
21 allegations in paragraph 13, Everest is without sufficient knowledge or information necessary to
22 form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies the
23 remaining allegations.

24 14. Answering paragraph 14, Everest is without sufficient knowledge or information
25 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
26 therefore, denies each and every allegation.

27 15. Answering paragraph 15, Everest is without sufficient knowledge or information
28 necessary to form a belief as to the truth or falsity of the allegations contained therein and,

1 therefore, denies each and every allegation.

2 16. Answering paragraph 16, Everest admits that it is aware of a document titled "Land
3 Development Construction Agreement" purportedly between "Continental Landscaping &
4 Sprinkler Company, Inc." and "Centex Homes", which reflects that it was executed in May, 2008,
5 and which references the "Roselake" project. The content of the document speaks for itself. To
6 the extent a further response is required, Everest is without sufficient knowledge or information
7 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
8 therefore, denies each and every allegation.

9 17. Answering paragraph 17, Everest is without sufficient knowledge or information
10 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
11 therefore, denies each and every allegation.

12 18. Answering paragraph 18, Everest is without sufficient knowledge or information
13 necessary to form a belief as to the truth or falsity of the allegations contained therein and
14 therefore, denies the same.

15 19. Answering paragraph 19, Everest is without sufficient knowledge or information
16 necessary to form a belief as to the truth or falsity of the allegations contained therein and
17 therefore, denies each and every allegation.

18 20. Answering paragraph 20, Everest is without sufficient knowledge or information
19 necessary to form a belief as to the truth or falsity of the allegations contained therein and
20 therefore, denies each and every allegation.

21 21. Answering paragraph 21, Everest is without sufficient knowledge or information
22 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
23 therefore, denies each and every allegation.

24 **Response to The Everest Policies**

25 22. Answering paragraph 22, Everest admits that it is aware of a document titled "Land
26 Development Construction Agreement," purportedly between Centex Homes and "Continental
27 Landscaping & Sprinkler Company, Inc.," and which concerns the "Roselake" project, the "Rose
28 Lake Units" subdivision and the "HOA Turnover" phase. With regard to the remaining allegations

1 in paragraph 22, Everest is without sufficient knowledge or information necessary to form a belief
2 as to the truth or falsity of the allegations contained therein and, therefore, denies the remaining
3 allegations.

4 23. Answering paragraph 23, Everest admits that it is aware of a document identified as a
5 "Master Construction Agreement" purportedly between "Continental Landscaping & Sprinkler
6 Co., Inc." and "Centex Homes dba Real Homes" and executed in September, 2006." Centex
7 denies that the document specifically makes reference to any of the "Developments." Everest
8 further admits that it is aware of a document titled "Land Development Construction Agreement"
9 purportedly between "Continental Landscaping & Sprinkler Company, Inc." and "Centex Homes"
10 which reflects it was executed in May, 2008, and which references the "Roselake" project. The
11 content of each document speaks for itself. To the extent a further response is required, Everest is
12 without sufficient knowledge or information necessary to form a belief as to the truth or falsity of
13 the allegations contained therein and, therefore, denies each and every allegation.

14 24 Answering paragraph 24, Everest admits that it issued policy numbers
15 1700003884-41 (effective 03/01/04 - 03/01/05), and 1700003884-51 (03/01/05 - 03/01/06) and
16 1700003884-61 (effective 03/01/06 - 03/01/07) and under which Continental Landscaping &
17 Sprinkler Co. is an insured.

18 25. Answering paragraph 25, Plaintiff's allegation calls for a legal conclusion and no
19 response is required. However, to the extent a further response is required, Everest denies that the
20 contracts of insurance it issued specifically designate Plaintiff as an "additional insured."

21 26. Answering paragraph 26, Everest admits that it agreed to provide Plaintiff a
22 defense in the Kachnik action under policy numbers 1700003884-41 and 1700003884-61 under a
23 full and complete reservation of rights. Everest further admits that it is obligated to defend
24 Plaintiff against such claims that are potentially covered under said policies and that other insurers
25 have a duty to defend Centex along with Everest. Everest denies that the terms, conditions and
26 provisions of policy number 1700003884-51 require that Everest provide Plaintiff a defense in the
27 Kachnik action. As to the remaining allegations in paragraph 26, Everest denies the remaining
28 allegations.

27. Answering paragraph 27, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

Response to The Interstate Policies

28. Answering paragraph 28, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

29. Answering paragraph 29, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

30. Answering paragraph 30, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

31. Answering paragraph 31, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

32. Answering paragraph 32, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

33. Answering paragraph 33, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

Response to The Lexington Policies

34. Answering paragraph 34, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

35. Answering paragraph 35, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and,

1 therefore, denies each and every allegation.

2 36. Answering paragraph 36, Everest is without sufficient knowledge or information
3 necessary to form a belief as to the truth or falsity of the allegations contained therein and
4 therefore, denies each and every allegation.

5 37. Answering paragraph 37, Everest is without sufficient knowledge or information
6 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
7 therefore, denies each and every allegation.

8 38. Answering paragraph 38, Everest is without sufficient knowledge or information
9 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
10 therefore, denies each and every allegation.

11 39. Answering paragraph 39, Everest is without sufficient knowledge or information
12 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
13 therefore, denies each and every allegation.

14 **Response to The Federal Policies**

15 40. Answering paragraph 40, Everest is without sufficient knowledge or information
16 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
17 therefore, denies each and every allegation.

18 41. Answering paragraph 41, Everest is without sufficient knowledge or information
19 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
20 therefore, denies each and every allegation.

21 42. Answering paragraph 42, Everest is without sufficient knowledge or information
22 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
23 therefore, denies each and every allegation.

24 43. Answering paragraph 43, Everest is without sufficient knowledge or information
25 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
26 therefore, denies each and every allegation.

27 44. Answering paragraph 44, Everest is without sufficient knowledge or information
28 necessary to form a belief as to the truth or falsity of the allegations contained therein and,

1 therefore, denies each and every allegation.

2 45. Answering paragraph 45, Everest is without sufficient knowledge or information
3 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
4 therefore, denies each and every allegation

5 **Response to The Travelers Policy**

6 46. Answering paragraph 46, Everest is without sufficient knowledge or information
7 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
8 therefore, denies each and every allegation.

9 47. Answering paragraph 47, Everest is without sufficient knowledge or information
10 necessary to form a belief as to the truth or falsity of the allegations contained therein and
11 therefore, denies each and every allegation.

12 48. Answering paragraph 48, Everest is without sufficient knowledge or information
13 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
14 therefore, denies each and every allegation.

15 49. Answering paragraph 49, Everest is without sufficient knowledge or information
16 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
17 therefore, denies each and every allegation.

18 50. Answering paragraph 50, Everest is without sufficient knowledge or information
19 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
20 therefore, denies each and every allegation.

21 51. Answering paragraph 51, Everest is without sufficient knowledge or information
22 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
23 therefore, denies each and every allegation.

24 **Response To The Kachnik Action**

25 52. Answering paragraph 52, Everest admits that plaintiff homeowners filed a "First
26 Amended Complaint" in the Kachnik action. Everest further admits that the plaintiff homeowners
27 allege in their First Amended Complaint that their homes have defects which was caused by the
28 acts or omissions in the "design, specification, planning, supervision observation of construction,

1 construction, development and/or improvement" of the homes. With respect to the remaining
2 allegations in paragraph 52, Everest further responds that the First Amended Complaint in the
3 Kachnik action speaks for itself. To the extent a further response is required, Everest is without
4 sufficient knowledge or information necessary to form a belief as to the truth or falsity of the
5 allegations contained therein and, therefore, denies each and every allegation.

6 53. Answering paragraph 53, Everest is without sufficient knowledge or information
7 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
8 therefore, denies each and every allegation.

9 54. Answering paragraph 54, Everest is without sufficient knowledge or information
10 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
11 therefore, denies each and every allegation.

12 55. Answering paragraph 55, Everest is without sufficient knowledge or information
13 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
14 therefore, denies each and every allegation.

15 56. Answering paragraph 56, Everest is without sufficient knowledge or information
16 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
17 therefore, denies each and every allegation.

18 57. Answering paragraph 57, Everest is without sufficient knowledge or information
19 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
20 therefore, denies each and every allegation.

21 58. Answering paragraph 58, Everest is without sufficient knowledge or information
22 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
23 therefore, denies each and every allegation

24 59. Answering paragraph 59, Everest is without sufficient knowledge or information
25 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
26 therefore, denies each and every allegation.

27 60. Answering paragraph 60, Everest admits that it received a correspondence from
28 Koeller, Nebeker, Carlson & Hauluck, LLP, dated August 20, 2014, which document speaks for

1 itself, and that Everest considered Centex's correspondence in making its coverage determination
2 as to the tender in connection with the Kachnik action. As to the remaining allegations in
3 paragraph 60, these are Centex's legal contention(s) to which a response is not required.

4 61. Answering paragraph 61, Everest denies that Centex has incurred or will be forced
5 to incur costs, fees or expenses due to any conduct by Everest. With respect to the remaining
6 allegations in paragraph 61, Everest is without sufficient knowledge or information necessary to
7 form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies the
8 remaining allegations.

9 **Response To Everest Responds To The *Kachnik* Action**

10 62. Answering paragraph 62, Everest admits that it received a correspondence dated
11 August 20, 2014, from Koeller, Nebeker, Carlson & Hauluck, LLP, tendering Centex's defense
12 and indemnity of the action.

13 63. Answering paragraph 63, Everest admits that pursuant to an October 29, 2014
14 correspondence, Everest agreed to defend Plaintiff in the Kachnik action under policy numbers
15 1700003884-41 and 1700003884-61 under a full and complete reservation of rights, including the
16 right to seek reimbursement of defense fees and costs which are not potentially covered under the
17 policies.

18 Everest denies that agreed to provide Plaintiff a defense in the Kachnik action under
19 policy number 1700003884-51. Everest further denies that it "limited its obligation" to pay
20 toward the defense a portion of the sums owed.

21 64. Answering paragraph 64, Everest admits it has expended approximately
22 \$328,319.25 to provide Plaintiff a defense in the Kachnik action.

23 65. Answering paragraph 65, Everest admits that it has a duty to pay the reasonable
24 defense fees and costs incurred for Plaintiff's defense in the Kachnik action which are potentially
25 covered under the policies issued by Everest and under which Everest agreed to provide Plaintiff a
26 defense under a full and complete reservation of rights, including the right to seek reimbursement
27 of defense fees and costs which are not potentially covered under the policies.
28

66. Answering paragraph 66, Everest denies that Plaintiff was forced to expend, or will be forced to expend, time or money for its defense in the Kachnik action due to any failure by Everest.

Response to Interstate Responds to the *Kachnik* Action

67. Answering paragraph 67, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

68. Answering paragraph 68, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

69. Answering paragraph 69, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

70. Answering paragraph 70, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

71. Answering paragraph 71, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

72. Answering paragraph 72, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

73. Answering paragraph 73, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

74. Answering paragraph 74, Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies each and every allegation.

1 75. Answering paragraph 75, Everest is without sufficient knowledge or information
2 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
3 therefore, denies each and every allegation.

4 76. Answering paragraph 76, Everest is without sufficient knowledge or information
5 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
6 therefore, denies each and every allegation.

7 **Response to Lexington Responds to the *Kachnik* Action**

8 77. Answering paragraph 77, Everest is without sufficient knowledge or information
9 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
10 therefore, denies each and every allegation.

11 78. Answering paragraph 78, Everest is without sufficient knowledge or information
12 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
13 therefore, denies each and every allegation.

14 79. Answering paragraph 79, Everest is without sufficient knowledge or information
15 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
16 therefore, denies each and every allegation.

17 80. Answering paragraph 80, Everest is without sufficient knowledge or information
18 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
19 therefore, denies each and every allegation.

20 **Response to Federal Responds to the *Kachnik* Action**

21 81. Answering paragraph 81, Everest is without sufficient knowledge or information
22 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
23 therefore, denies each and every allegation.

24 82. Answering paragraph 82, Everest is without sufficient knowledge or information
25 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
26 therefore, denies each and every allegation.

27 83. Answering paragraph 83, Everest is without sufficient knowledge or information
28 necessary to form a belief as to the truth or falsity of the allegations contained therein and,

1 therefore, denies each and every allegation.

2 84. Answering paragraph 84, Everest is without sufficient knowledge or information
3 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
4 therefore, denies each and every allegation.

5 **Response to Travelers Responds to the *Kachnik* Action.**

6 85. Answering paragraph 85, Everest is without sufficient knowledge or information
7 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
8 therefore, denies each and every allegation.

9 86. Answering paragraph 86, Everest is without sufficient knowledge or information
10 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
11 therefore, denies each and every allegation.

12 87. Answering paragraph 87, Everest is without sufficient knowledge or information
13 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
14 therefore, denies each and every allegation.

15 88. Answering paragraph 88, Everest is without sufficient knowledge or information
16 necessary to form a belief as to the truth or falsity of the allegations contained therein and,
17 therefore, denies each and every allegation.

18 **RESPONSE TO FIRST CAUSE OF ACTION**

19 **Breach of Contract**

20 89. Answering paragraph 89, Everest repeats and re-alleges each and every answer set
21 forth in paragraphs 1 - 88 as though fully set forth herein.

22 90. Answering paragraph 90, Everest admits that Plaintiff requested a defense from
23 Everest regarding the Kachnik action. Everest further admits that it agreed to provide Plaintiff
24 with a defense under policy numbers 1700003884-41 and 1700003884-61 under a full and
25 complete reservation of rights, including the right to seek reimbursement of defense fees and costs
26 which are not potentially covered under the policies. Everest denies that Plaintiff performed the
27 obligations or otherwise satisfied the relevant conditions precedent to be entitled to a defense
28 under policy number 1700003884-51. To the extent the allegations in paragraph 90 do not

1 concern Everest, Everest is without sufficient knowledge or information necessary to form a belief
2 as to the truth or falsity of the allegations contained therein and, therefore, denies the remaining
3 allegations.

4 91. Answering paragraph 91, to the extent the allegations contained therein relate to
5 Everest, Everest denies each and every allegation. With regard to all other allegations therein,
6 Everest is without sufficient knowledge or information necessary to form a belief as to the truth or
7 falsity of the allegations contained therein and, therefore, denies remaining same.

8 92. Answering paragraph 92, to the extent the allegations contained therein relate to
9 Everest, Everest denies each and every allegation. With regard to all other allegations therein,
10 Everest is without sufficient knowledge or information necessary to form a belief as to the truth or
11 falsity of the allegations contained therein and, therefore, denies the remaining allegations.

12 **RESPONSE TO SECOND CAUSE OF ACTION**

13 **Breach of the Implied Covenant of Good Faith and Fair Dealing**

14 93. Answering paragraph 93, Everest repeats and re-alleges each and every answer set
15 forth in paragraphs 1 - 92 as though fully set forth herein.

16 94. Answering paragraph 94, Everest denies the allegations contained therein, save and
17 except admits that a duty of good faith exists between an insurer and insured.

18 95. Answering paragraph 95, to the extent the allegations contained therein relate to
19 Everest, Everest denies each and every allegation. With regard to all other allegations therein,
20 Everest is without sufficient knowledge or information necessary to form a belief as to the truth or
21 falsity of the allegations contained therein and, therefore, denies the remaining allegations.

22 96. Answering paragraph 96, to the extent the allegations contained therein relate to
23 Everest, Everest denies each and every allegation. With regard to all other allegations therein,
24 Everest is without sufficient knowledge or information necessary to form a belief as to the truth or
25 falsity of the allegations contained therein and, therefore, denies the remaining allegations.

26 97. Answering paragraph 97, to the extent the allegations contained therein relate to
27 Everest, Everest denies each and every allegation. With regard to all other allegations therein,
28 Everest lacks sufficient information or knowledge to form a belief as to the truth or falsity of those

1 allegations contained therein and, therefore, denies the remaining allegations.

2 98. Answering paragraph 98, to the extent the allegations contained therein relate to
3 Everest, Everest denies each and every allegation. With regard to all other allegations therein,
4 Everest lacks sufficient information or knowledge to form a belief as to the truth or falsity of those
5 allegations and, therefore, denies the remaining allegations.

6 99. Answering paragraph 99, to the extent the allegations contained therein relate to
7 Everest, Everest denies each and every allegation. With regard to all other allegations therein,
8 Everest lacks sufficient information or knowledge to form a belief as to the truth or falsity of those
9 allegations and, therefore, denies the remaining allegations.

10 100. Answering paragraph 100, to the extent the allegations contained therein relate to
11 Everest, Everest denies each and every allegation. With regard to all other allegations therein,
12 Everest lacks sufficient information or knowledge to form a belief as to the truth or falsity of those
13 allegations and, therefore, denies the remaining allegations.

14 101. Answering paragraph 101, to the extent the allegations contained therein relate to
15 Everest, Everest denies each and every allegation. With regard to all other allegations therein,
16 Everest lacks sufficient information or knowledge to form a belief as to the truth or falsity of those
17 allegations and, therefore, denies the remaining allegations.

18 **RESPONSE TO THIRD CAUSE OF ACTION**

19 **Violations of Nevada's Unfair Claims Settlement Practices Action,**

20 **Nev. Rev. Stat. Ann. § 686A.310**

21 102. Answering paragraph 102, Everest repeats and re-alleges each and every answer set
22 forth in paragraphs 1 - 101 as though fully set forth herein.

23 103. Answering paragraph 103, to the extent the allegations contained therein relate to
24 Everest, Everest denies each and every allegation. With regard to all other allegations therein,
25 Everest is without sufficient knowledge or information necessary to form a belief as to the truth or
26 falsity of the allegations contained therein and, therefore, denies the remaining allegations.

27 104. Answering paragraph 104, to the extent the allegations contained therein relate to
28 Everest, Everest denies each and every allegation. With regard to all other allegations therein,

1 Everest is without sufficient knowledge or information necessary to form a belief as to the truth or
2 falsity of the allegations contained therein and, therefore, denies the remaining allegations.

3 105. Answering paragraph 105, to the extent the allegations contained therein relate to
4 Everest, Everest denies each and every allegation. With regard to all other allegations therein,
5 Everest is without sufficient knowledge or information necessary to form a belief as to the truth or
6 falsity of the allegations contained therein and, therefore, denies the remaining allegations.

7 106. Answering paragraph 106, to the extent the allegations contained therein relate to
8 Everest, Everest denies each and every allegation. With regard to all other allegations therein,
9 Everest is without sufficient knowledge or information necessary to form a belief as to the truth or
10 falsity of the allegations contained therein and, therefore, denies the remaining allegations.

11 **RESPONSE TO FOURTH CAUSE OF ACTION**

12 **Declaratory Relief**

13 107. Answering paragraph 107, Everest repeats and re-alleges each and every answer set
14 forth in paragraphs 1 - 106 as though fully set forth herein.

15 108. Answering paragraph 108, Everest admits that pursuant to the allegations in the
16 Complaint, a controversy exists between itself and Plaintiff concerning certain alleged obligations
17 under the contracts of insurance issued by Everest. With regard to all other allegations therein,
18 Everest lacks sufficient information or knowledge to form a belief as to the truth or falsity of those
19 allegations and, therefore, denies the remaining allegations.

20 109. Answering paragraph 109, to the extent the allegations contained therein relate to
21 Everest, Everest admits that denies each of Plaintiff's contentions. With regard to all other
22 allegations therein, Everest lacks sufficient information or knowledge to form a belief as to the
23 truth or falsity of those allegations and, therefore, denies the remaining allegations.

24 110. Answering paragraph 110, Everest admits that by way of the Complaint, Plaintiff
25 seeks a judicial determination as to the issues pled therein. Everest denies that Plaintiff is entitled
26 to any such judicial determination as to Everest.

27 111. Answering paragraph 111, to the extent the allegations contained therein relate to
28 Everest, Everest denies each and every allegation. With regard to all other allegations therein,

Everest is without sufficient knowledge or information necessary to form a belief as to the truth or falsity of the allegations contained therein and, therefore, denies the remaining allegations.

RESPONSE TO THE PRAYER FOR RELIEF

As to Plaintiff's prayer for relief and for all causes of action, Everest denies that Plaintiff to the relief sought.

AFFIRMATIVE DEFENSES

As for separate affirmative defenses, Everest alleges the following:

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

Plaintiff's claims are barred, in whole or in part, to the extent that the Complaint, and each purported cause of action therein, fails to state facts sufficient to constitute a cause of action against Everest.

SECOND AFFIRMATIVE DEFENSE

(Policy Provisions Bar Claims)

Plaintiff's claims are barred, in whole or in part, by the terms, exclusions, conditions, definitions, declarations, endorsements, and/or limitations contained in the policies identified in plaintiff's complaint and purportedly issued by Everest.

THIRD AFFIRMATIVE DEFENSE

(Failure to Perform Conditions/Obligations Under the Policy)

Plaintiff's claims are barred, in whole or in part, because of a failure to perform conditions or obligations under the Everest policies.

FOURTH AFFIRMATIVE DEFENSE

(Deductibles/Self-Insured Retentions)

Plaintiff's claims are barred, in whole or in part, to the extent that any deductibles and/or self-insured retentions are included in the Everest policies and which have not been properly satisfied.

///

///

FIFTH AFFIRMATIVE DEFENSE

(Exhaustion/Impairment of Limits)

Plaintiff's claims are barred, in whole or in part, to the extent that the Everest policies are exhausted or otherwise impaired.

SIXTH AFFIRMATIVE DEFENSE

(Set-Off Entitlement)

Any amounts allegedly recoverable under the Everest policies, if any, must be reduced or offset by recoveries plaintiff has already obtained, or may in the future obtain, from other sources including, but not limited to, settlements with other insurers and sureties, subcontractors, and those subcontractors' insurers and sureties.

SEVENTH AFFIRMATIVE DEFENSE

(Impairment of Subrogation and Contribution Rights)

Plaintiff's claims are barred, in whole or in part, to the extent that Everest's rights of subrogation and contribution have been impaired.

EIGHTH AFFIRMATIVE DEFENSE

(Non-Disclosure, Concealment, or Misrepresentation of Facts)

Plaintiff's claims are barred, in whole or in part, to the extent that any named insureds and/or alleged additional insured failed to disclose or otherwise concealed or misrepresented facts known to it which were material to the risk allegedly underwritten by Everest.

NINTH AFFIRMATIVE DEFENSE

(Other Insurance)

Plaintiff's claims are barred, in whole or in part, to the extent that other insurance covering the alleged claims is obligated to respond.

TENTH AFFIRMATIVE DEFENSE

(No Coverage for Non-Insureds)

Plaintiff's claims are barred, in whole, or in part, to the extent that they arise out of claims against any person or entity not an insured under the Everest policies.

ELEVENTH AFFIRMATIVE DEFENSE

(Proper Allocation Required)

To the extent that Everest is found to have any obligation with regard to the damages alleged by plaintiff in the present action, a proper allocation of the loss as between Everest and other insurers is required. Such allocation may result in no sums being allocated to the Everest policies.

TWELFTH AFFIRMATIVE DEESNE

(Everest has Already Paid its Equitable Share)

To the extent that Everest is found to have any obligation with regard to the damages alleged by plaintiff in the present action, Everest has already contributed more than its equitable share toward Centex's defense and/or indemnity.

THIRTEENTH AFFIRMATIVE DEFENSE

(Unreasonable Attorney's Fees-Hourly Rates)

Everest has no obligation to contribute towards attorney's fees sought by plaintiff to the extent that the hourly rate charged was unreasonable and excessive.

FOURTEENTH AFFIRMATIVE DEFENSE

(Pre-Tender Defense Costs not Covered)

Plaintiff's claims are barred, in whole or in part, to the extent that any defense fees and costs were incurred prior to the time the defense was tendered, if ever tendered, to Everest.

FIFTEENTH AFFIRMATIVE DEFENSE

(Unreasonable Costs or Payment)

To the extent that coverage is proved to exist under the Everest policies for plaintiff's alleged claims, Everest is not required to reimburse, indemnify or otherwise make payment for any unreasonable, excessive, improper, unnecessary, or unrelated costs or sums incurred by plaintiff.

SIXTEENTH AFFIRMATIVE DEFENSE

(Mitigation Obligation)

Plaintiff's claims are barred, in whole or in part, because the named insured and/or alleged additional insured have failed to mitigate, minimize, or avoid any damages allegedly sustained,

1 and any recovery against Everest must therefore be reduced by the amount of damages incurred as
2 a result of that failure.

3 **SEVENTEENTH AFFIRMATIVE DEFENSE**

4 **(Damages not Within Policy Terms)**

5 Plaintiff's claims are barred, in whole or in part, to the extent that the alleged damage for
6 which coverage is sought did not take place during the effective dates of the Everest policies.

7 **EIGHTEENTH AFFIRMATIVE DEFENSE**

8 **(Voluntary Payments)**

9 Plaintiff's claims are barred, in whole or in part, to the extent that any insured made any
10 payments, assumed any obligation, or incurred any expense, other than for first aid, without
11 Everest's consent.

12 **NINETEENTH AFFIRMATIVE DEFENSE**

13 **(Waiver, Estoppel, and Laches)**

14 Plaintiff's claims are barred and/or plaintiff is precluded from seeking any relief asserted
15 herein by the doctrines of waiver, estoppel, and/or laches.

16 **TWENTIETH AFFIRMATIVE DEFENSE**

17 **(Unclean Hands)**

18 Plaintiff is barred from seeking any equitable relief by reason of its own unclean hands.

19 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

20 **(Good Faith)**

21 At all times material herein, Everest acted reasonably and in good faith toward the plaintiff
22 based upon all relevant facts and circumstances known to it at the time, and fully performed all
23 terms, conditions, covenants and promises to be performed pursuant to the applicable policies,
24 except where such performance was excused, discharged or prevented.

25 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

26 **(Genuine Dispute)**

27 The interpretation of any applicable Everest policy is based upon genuinely disputable
28 issue(s) and/or question(s) of law or fact.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Punitive Damages Unconstitutional)

Everest is informed and believes and thereon alleges that the claim for extra contractual and/or punitive damages and/or the award and/or recovery of extra contractual and/or punitive damages is unconstitutional under the United States and Nevada Constitutions.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Reservation to Amend)

Everest reserves the right to amend, supplement, alter or change its answer and affirmative defenses upon revelation of more definitive facts by plaintiff and/or upon discovery and investigation in this matter.

PRAYER

WHEREFORE, having fully responded to the subject complaint, Everest prays:

1. That Plaintiff take nothing by reason of its Complaint herein;
2. That Plaintiff's Complaint be dismissed with prejudice and that Everest be awarded judgment against plaintiff;
3. That Everest be awarded all of its costs incurred in connection with this action; and
4. That Everest be awarded such other and further relief as the court may deem just and proper.

DATED: February 23, 2018

SELMAN BREITMAN LLP

By: /s/DAVID A. ASTENGO

DAVID A. ASTENGO

NEVADA BAR NO. 11045

33 New Montgomery, Sixth Floor

San Francisco, CA 94105-4537

Phone: 415.979.2082

Facsimile: 415.979.2099

Attorneys for Defendant/

Counterclaimant/Cross-Claimant, EVEREST

NATIONAL INSURANCE COMPANY

EVEREST NATIONAL INSURANCE COMPANY'S FIRST AMENDED
COUNTERCLAIM AGAINST CENTEX HOMES

COMES NOW defendant/counterclaimant EVEREST NATIONAL INSURANCE COMPANY (hereinafter "Everest"), by and through its counsel, and for its First Amended Counterclaim against plaintiff/counterdefendant CENTEX HOMES (hereinafter, "Centex") alleges as follows:

THE PARTIES

1. Everest is informed and believes, and on that basis alleges, that at all times relevant, Centex was and is a Nevada general partnership with its principal place of business in Atlanta, Georgia.

2. Everest is an organization organized under the laws of the State of Delaware, with its principal place of business in New Jersey. Everest is as an insurer eligible to do business in the State of Nevada.

JURISDICTION AND VENUE

3. This Court has original jurisdiction founded on diversity of citizenship pursuant to 28 U.S.C. §1332, because the matters in controversy exceed \$75,000.00, exclusive of interest and costs, and because complete diversity exists between Centex and Everest.

4. Venue is proper in this Court in accordance with 28 U.S.C. § 1391.

GENERAL ALLEGATIONS

5. Everest issued certain insurance policies to Continental Landscaping & Sprinkler Company Co. (hereinafter, "Continental") identified by policy number 1700003884-041, effective March 1, 2004 to March 1, 2005, and 1700003884-061, effective March 1, 2006 to March 1, 2007 (hereinafter, collectively the "Everest Policies").

6. Everest is informed and believes, and on that basis alleges, that Centex participated in the construction of one or more residential developments known as Terraces, Berkshire Estates, Berkshire Estates II and Cantura, which are collectively herein referred to as "the developments" and which are located in Las Vegas, Nevada.

7. Everest is informed and believes, and on that basis alleges, Continental contracted

1 with Centex to provide certain fine grading services and materials for the building of one or more
2 of the developments.

3 8. Certain homeowners in the developments brought an action captioned, *Kachnik, et*
4 *al. v. Centex Homes, et al.*, Eighth Judicial District Court, Clark County, Nevada, Case No. A-15-
5 726385-D (hereinafter the "Kachnik action"), against Centex and alleging, among other things,
6 that homes in one or more of the developments contained were defective and negligently
7 constructed and that these defects caused damages for which Centex is liable.

8 9. Everest received a correspondence from Koeller, Nebeker, Carlson & Hauluck,
9 LLP (hereinafter, the "Koeller law firm") who was representing Centex with respect to the
10 Kachnik action. By way of the correspondence, it was requested that Everest provide Centex a
11 defense and indemnity under the Everest Policies in the Kachnik action. The Koeller firm
12 purported to enclose copies of certain documents with the correspondence but not contract(s)
13 pursuant to which Continental purportedly performed work at the developments.

14 10. In response to the Koeller law firm's tender of the Kachnik action on Centex's
15 behalf, Everest accepted the tender and agreed to provide a "complete defense," and which
16 "include covered and uncovered claims," and immediately defended Centex as an additional
17 insured under the Everest Policies through the Koeller law firm and under a full and complete
18 reservation of rights, including, but not limited to, the right to seek reimbursement from Centex
19 for defense fees and costs paid by Everest or otherwise incurred for the defense of claims asserted
20 against Centex in the action that are not even potentially covered under the Everest Policies. Upon
21 its receipt of Everest's correspondence wherein it agreed to defend Centex, Centex did not
22 communicate an objection to Everest's reservation of its right to seek such reimbursement from
23 Centex.

24 11. Everest is informed and believes, and on that basis alleges, that the claims in the
25 Kachnik action seek damages from Centex for property damage arising out of the work or
26 operations of various subcontractors, and not only Continental, with whom Centex contracted to
27 provide certain work, services and/or materials for the building of one or more of the
28 developments.

12. Everest has paid and otherwise incurred in excess of \$300,000 in defense fees and costs on behalf of Centex to provide Centex the defense in the Kachnik action.

FIRST CAUSE OF ACTION FOR EQUITABLE REIMBURSEMENT

13. Everest hereby re-alleges and incorporates by reference each of the allegations contained in all preceding paragraphs of this First Amended Counterclaim as though fully set forth herein.

14. Everest has defended Centex through the Koeller law firm against the claims in the Kachnik action and paid and otherwise incurred defense fees and costs incurred by Centex in defense of the action. Everest did not pay or incur these sums as a volunteer. When Everest agreed to defend Centex, Everest explicitly reserved the right to seek reimbursement from Centex for defense fees and costs paid by Everest for the defense of claims asserted against Centex in the Kachnik action that are not potentially covered under the Everest Policies.

15. Certain claims asserted against Centex in the Kachnik action are not potentially covered under the Everest Policies.

16. Everest has paid and otherwise incurred defense fees and costs to provide Centex the defense in the Kachnik action against claims which are not even potentially covered under the Everest Policies. Centex has, therefore, been unjustly enriched by Everest's payments.

17. As a result of Centex's unjust enrichment, a quasi-contractual right of reimbursement has arose in favor of Everest in the amount Everest paid and otherwise incurred for the defense of Centex against claims in the Kachnik action which are not potentially covered under the Everest Policies. The precise amount of the reimbursement that is appropriate will be subject to proof at trial.

PRAYER FOR RELIEF

WHEREFORE, Everest requests the following relief from this Court:

1. For a judgment in favor of Everest for reimbursement in the amount to be determined at trial, but in any event in an amount greater than \$75,000 for defense fees and costs that Everest paid or otherwise incurred under the Everest Policies to defend Centex against claims in the Kachnik action which are not potentially covered under the Everest Policies;

2. For interest at a legal rate until the judgment is paid;
3. For attorneys' fees and costs; and
4. For such other and further relief as the court deems just and proper.

DATED: February 23, 2018

SELMAN BREITMAN LLP

/s/DAVID A. ASTENGO
DAVID A. ASTENGO
NEVADA BAR NO. 11045
33 New Montgomery, Sixth Floor
San Francisco, CA 04105-4537
Defendant/Counterclaimant/Cross-
Claimant, EVEREST NATIONAL
INSURANCE COMPANY

IT IS SO ORDERED.



UNITED STATES MAGISTRATE JUDGE

DATED: 2-26-2018